

## **Explanatory Memorandum on the amendments to Convention 108 allowing the accession of the European Communities**

### **Introduction and background**

1. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (hereinafter referred to as "the Convention") was opened for signature on 28 January 1981. It entered into force on 1 October 1985.

2. In accordance with Article 18 of the Convention, a Consultative Committee was set up in 1986 and has since reviewed the implementation of the Convention by the Parties, in particular with regard to the economic, technical and political developments in so far as they are of relevance to data protection.

3. Among the important developments of relevance to the Convention was the adoption of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 "on the protection of individuals with regard to the processing of personal data and on the free movement of such data" within the European Communities. The Directive drew much inspiration from the Convention, and aimed at spelling out and expanding on the principles it enshrines. On the basis of the treaties establishing the European Communities, and taking into account in particular the Directive, the European Communities are henceforth empowered to enter into international agreements in the fields it covers. Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive at the latest by 24 October 1998. The provisions are also to be applied to the institutions and organisations of the European Communities.

4. In a letter dated 22 October 1997 the Secretary General of the European Commission notified the Secretary General of the Council of Europe of the application of the Communities to accede to the Convention, and the decision of the Council of the Union, on 22 July 1997, to authorise the Commission to start negotiations with a view to acceding to the Convention as soon as possible. Accession by the Communities reflects the European Union's wish to develop co-operation with the Council of Europe and help create a stronger international forum on data protection, particularly vis-à-vis third countries

5. As it stands at present, only states may be Parties to the Convention. It was therefore necessary to draft amendments allowing the European Communities to accede.

6. The Consultative Committee drew up the amendments in accordance with Article 21 of the Convention. The Committee of Ministers of the Council of Europe approved them at its 675th meeting on 15 June 1999. Following their approval by the Committee of Ministers, the amendments will be submitted to the Parties for acceptance. Under the provisions of Article 21, paragraph 6, of the Convention the amendments will come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof. Following their entry into force, the European Communities will be able to accede to the Convention.

## **Comments on the amendments**

### **Articles 1, 3, 5 and 6**

7. The amendments to Article 3, paragraphs 2, 3 and 6, Article 21, paragraph 2, Article 24 and Article 27 of the Convention are formal amendments, adding the expression "the European Communities" to all the provisions of the Convention which refer only to states.

### **Article 2**

8. The amendment to Article 20 of the Convention aims at regulating voting rights on the Consultative Committee. The new paragraph 3 of Article 20 of the Convention contains a flexible clause taking into account the evolution in the distribution of competencies between the European Communities and its member states. It is modelled on similar provisions contained, *inter alia*, in Article 13.2 of the European Convention for the Conservation of European Wildlife and Natural Habitats (ETS 104, 1979) and Article 20.2 of the European Convention on Transfrontier Television (ETS 132, 1989). It also takes account of the provisions of the Treaty of Amsterdam which modifies the treaties setting up the European Communities. While this treaty transfers certain fields, in particular visas, asylum and immigration, to the field of competence of the European Communities, it also provides that certain member States of the Communities will not be bound by Community measures taken in these fields.

9. As a result, within the Consultative Committee, in the fields of their competence, the European Communities will exercise the right to vote and will have the same number of votes as the number of their member States which are Parties to the Convention and which have transferred their competence in the fields concerned to the European Communities. Moreover, the European Communities will not be able to exercise the right to vote when the member States vote and conversely.

### **Article 4**

10. The amendment to Article 23 of the Convention contains a provision permitting the European Communities to become a Party to the Convention. It provides for the European Communities to express their consent to be bound by the Convention by way of accession. Accession shall be secured by the deposit of an instrument of accession with the Secretary General of the Council of Europe.